

United States District Court  
Eastern District of California

United States of America,

Plaintiff,

vs.

Robert Frank Price,

Defendant.

No. Cr. S 95-0253 GEB

Civ. S 01-1226 MCE PAN P

Findings and Recommendations

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February 19, 1997, a jury convicted defendant of possessing methamphetamine for sale. October 3, 1997, the court sentenced him to 360 months imprisonment. The court of appeals remanded its order affirming the conviction October 5, 1999.

June 25, 2001, defendant moved to vacate or set aside his sentence. 28 U.S.C. § 2255. The government opposed March 14, 2003, and defendant replied May 15, 2003.

Defendant argues his sentence is unconstitutional because it is based on a drug quantity not found by a jury beyond a

1 reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000).  
2 The United States Supreme Court has held that the rationale set  
3 forth in Apprendi applies equally to defendants sentenced under  
4 the Federal Sentencing Guidelines. United States v. Booker, \_\_\_\_  
5 U.S. \_\_\_\_, 125 S.Ct. 738 (2005). Nevertheless, the Ninth Circuit  
6 consistently has held Apprendi claims cannot be raised on initial  
7 collateral review. United States v. Sanchez-Cervantes, 282 F.3d  
8 664 (9th Cir. 2002); Cooper-Smith v. Palmateer, 397 F.3d 1236,  
9 1245-46 (9th Cir. 2005). Booker does not apply retroactively on  
10 collateral review either. United States v. Cruz, 423 F.3d 119  
11 (9th Cir. 2005). Defendant admits in his motion to vacate the  
12 judgment was final before Apprendi was decided in June 2000.

13 Accordingly, the court hereby recommends:

14 1. Defendant's June 25, 2001, motion to vacate or set aside  
15 his sentence be denied.

16 2. The clerk of the court be directed to close the  
17 companion civil case number Civ. S 01-1226 MCE PAN P.

18 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these  
19 findings and recommendations are submitted to the United States  
20 District Judge assigned to this case. Written objections may be  
21 filed within 10 days of service of these findings and  
22 recommendations. The document should be captioned "Objections to  
23 Magistrate Judge's Findings and Recommendations." The district

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1 judge may accept, reject, or modify these findings and  
2 recommendations in whole or in part.

3 Dated: November 29, 2005.

4 /s/ Peter A. Nowinski

5 PETER A. NOWINSKI

6 Magistrate Judge  
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